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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1868

NATIONAL GEOGRAPHIC SOCIETY, *Appellant,*

v.

BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, *Appellee.*

OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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The National Geographic Society opposes the motion to dismiss or affirm filed by the Board of Equalization of the State of California for the reasons set forth in the Society's Jurisdictional Statement filed herein and on the further grounds hereinafter stated.

WITHOUT A *Sales-Related* CONNECTION BETWEEN THE TAXING STATE AND AN OUT-OF-STATE SELLER NO USE TAX LIABILITY CAN BE CONSTITUTIONALLY IMPOSED

In every instance where this Court has spoken with approval of the imposition of sales or use tax on out-of-state sellers (including those relied on by the California Board of Equalization) there was some in-state retail sales-related activity by the out-of-state seller.

Absent this common thread running through all these cases, this Court has refused, on constitutional grounds, to permit assessment of the sales or use tax. There is no case where this Court has upheld a liability for a sales-related tax where the out-of-state seller has confined its sales-related activities to instrumentalities of interstate commerce.

In *Scripto* v. *Carson,* 362 U.S. 207, 211 (1960), "continuous local solicitation" by in-state "salesmen" justified the imposition of use tax liability. In *Norton Co.* v. *Department of Revenue,* 340 U.S. 534, 538-539 (1951), taxation was upheld where the retailer "elected to localize itself in the Illinois market with the advantages of a retail outlet in the State." *General Trading Co.* v. *State Tax Commission,* 322 U.S. 335, 337 (1944), had "traveling salesmen sent into Iowa", and *Standard Pressed Steel Co.* v. *Washington Revenue Department,* 419 U.S. 560, 561 (1975), had a full-time employee living in-state "whose primary duty was to consult with Boeing regarding its anticipated needs and requirements for aerospace fasteners and to follow up any difficulties in the use of appellant's product after delivery" which followed a sale. And in *Nelson* v. *Sears, Roebuck & Co.,* 312 U.S. 359, 362, 364 (1941), the seller had 12 retail stores in-state and was qualified to do business in-state.[1]

[1] In its Motion to Dismiss or Affirm (pp. 3, 19-20), the Board has sought to obscure the facts by arguing that the Society should be treated as qualified to do business in California. As was stated in the Society's Jurisdictional Statement (p. 5):

> "The Society is not registered to do business in the State of California and does not engage in activities in the State of California which would require the Society so to register."

The record on appeal clearly establishes the accuracy of this statement. See, Clerk's Transcript on Appeal at 19; Opposition to Petition for Hearing at 27, 29 in the record before this Court. Additionally, the token over-the-counter sales occurred only during the first quarter in issue, not the second quarter. As was noted in the Society's Jurisdictional Statement (pp. 7-8), these sales were regarded as *de minimus* by the California Court of Appeal and were disregarded for purposes of its decision by the California Supreme Court.

Where such sales-related activity is lacking, this Court has refused to permit the states to tax an out-of-state seller.[2] As was stated in *National Bellas Hess* v. *Department of Revenue,* 386 U.S. 753, 758 (1976):

> ". . . the Court has never held that a state may impose the duty of use tax collection and payment upon a seller whose only connection with *customers* in the State is by common carrier or the United States mail." (emphasis added)

Similarly, in *American Oil Co.* v. *Neill,* 380 U.S. 451, 458 (1965), it was stated that, with respect to a sales-related tax, a company can "exempt itself by a clear showing that there are no in-state activities *connected with* out-of-state sales." (emphasis added.)

It is clear that the Society had no retail sales-related activities in the State of California connected with the

[2] The Board has cited (pp. 10-11, fn. 5) *Reader's Digest Association* v. *Mahin,* 255 N.E. 2d 458 (1970), *cert. denied,* 399 U.S. 919, as being supportive of the decision below. *Reader's Digest,* an Illinois Supreme Court decision and not a decision of this Court, was not referred to by the California Supreme Court below. More importantly, and directly contrary to the Board's assertion, the court in *Reader's Digest* imposed a use tax liability only after finding the company had engaged in extensive *local* advertising consisting of an advertisement of its products in the Chicago Sun Times and 305 local radio and television announcements. Reader's Digest's solicitors also had actively solicited retail sales of books and albums within the state. No local advertising of any kind or in-state solicitation of retail sales is present in the instant case.

mail order sales here in question. Thus, the California Supreme Court has impermissibly extended the limits of use tax collection liability with its holding that an in-state sales-related connection is no longer required to reach out-of-state sales. The "slightest presence" test adopted by the California Supreme Court is directly contrary to the numerous decisions of this Court that the imposition of a sales-related tax must be predicated on in-state sales activity. Such a test would clearly impose far-reaching and undesirable burdens on all retail sales made by interstate mail. Such a test is clearly unconstitutional. Accordingly, the decision of the court below should be summarily reversed.

Respectfully submitted,

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